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No. 84-1426

IN THE

United States Supreme Court

OCTOBER TERM, 1984

ROBERT ABRAMS, Attorney General of the State of New York,
Petitioner,

—v.—

MICHAEL MCCRAY,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

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Respondent Michael McCray submits this supplemental brief in support of his motion for an order granting the writ of certiorari in this case, and consolidating this case for purposes of oral argument with Batson v. The Commonwealth of Kentucky, No. 84-6263.

PROCEDURAL BACKGROUND

This motion represents a shift in respondent's position on the petition for certiorari. Previously, respondent had urged this Court not to grant certiorari despite the conceded importance of the constitutional issue raised by the petition. Specifically, respondent had argued that the question of whether a prosecutor could use peremptory challenges to exclude all potential minority jurors in a criminal trial was a matter of such significance that it should not be addressed by this Court until some of the difficult matters of

definition and implementation were first considered by the lower courts. In making this point, respondent merely echoed a suggestion first articulated by three members of this Court on an earlier petition for certiorari in this same case. McCray v. Abrams, ___ U.S. ___, 77 L.Ed.2d 1322, 1323 (1983) (concurring opinion of Justices Stevens, Blackmun and Powell).

In addition, respondent initially opposed certiorari on the ground that the parties to this case agree on the unconstitutionality of peremptory challenges exercised solely on the basis of race. Notwithstanding the obvious existence of a case and controversy under Article III, it was respondent's position at the time that prudential considerations counselled against a decision until this Court had an opportunity to hear and consider both sides of the argument.

On April 22, 1985, this Court agreed to

decide the question of whether the prosecutor's use of peremptory challenges to exclude all potential minority jurors in a criminal case violates the Sixth and/or Fourteenth Amendments by granting certiorari in Batson v. The Commonwealth of Kentucky, No. 84-6263. No decision has yet been announced on the petition for certiorari in the present case.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE GRANTED AND THIS CASE ARGUED IN TANDEM WITH BATSON

Because this Court has agreed to decide the constitutionality of race-based peremptory challenges, respondent's earlier objections to the grant of certiorari have clearly evaporated. Any concern that this Court might not have before it an advocate for the current constitutional rule barring any inquiry into the use of race-based peremptory challenges in a

particular case has been alleviated by the position of the respondent in Batson, who stongly argues for the continuing validity of this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965). Moreover, the order granting certiorari in Batson eliminates the prospect of a prolonged period of experimentation with a new constitutional rule by the lower courts.

Having granted certiorari in Batson, this Court should grant certiorari in the present case as well and consolidate the two cases for purposes of oral argument. Respondent appreciates the Court's desire to avoid needless duplication. Nevertheless, joint consideration of Batson and this case will materially assist the Court in its deliberations.

This is particularly so with regard to the procedural issues raised by the petition in this case. Batson comes to this Court as a

direct appeal from a criminal conviction in which the defendant's attack upon the prosecutor's use of peremptory challenges was rejected at every level below. Of necessity, therefore, the petition in Batson focuses on the threshhold issue of whether the use of peremptory challenges in a given case is absolutely immune from any judicial inquiry.

McCray comes to this Court in a totally different posture. The decision has already been made by the Second Circuit that some judicial inquiry is required and the dispute between the parties has concentrated on the contours of that inquiry, including the ingredients of a prima facie case and the proper allocation of the burden of proof.

Here, as elsewhere, questions of substance and procedure are inextricably intertwined. For that reason, as well as the interest in judicial economy, both questions should be

decided together. The latter set of procedural issues is presented far more clearly by the McCray case.

By hearing the two cases together, this Court will also have the benefit of a broader array of facts against which to formulate its constitutional ruling. The district court and the circuit court have each found a prima facie case of race discrimination in McCray. Furthermore, the record in McCray contains evidence that at least one minority juror was excused by the prosecution although his relative had been a crime victim, a revelation that would normally be thought to favor the prosecution. The documented use of racial stereotypes as an overriding consideration in trial strategy is surely a fact that this Court should consider in making its judgment.

In addition, by hearing the two cases together this Court will have an opportunity to explore two very different prosecutorial

views on the use and abuse of peremptory challenges. The clash between petitioner in McCray and respondent in Batson cannot help but illuminate the ultimate legal issue. This Court will also gain the opportunity to question the Kings County District Attorney about her practical experience during the period when the Swain rule was not being applied in New York. Those laboratory results offer the possibility, at least, of an empirical basis for this Court's final decision that is not duplicated by any other party now before the Court.

Finally, Michael McCray should not be left in the position of having his fate decided by the outcome of another case. That consequence may be unavoidable for other defendants still litigating the issue of peremptory challenges in the lower courts. McCray's case, however, is pending in this Court. Under the circumstances, he can and should be heard.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted, and this case should be consolidated for purposes of oral argument with Batson v. The Commonwealth of Kentucky, No. 84-6263.

Respectfully submitted,



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Dated: New York, New York
April 30, 1985